

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 841

SUSAN G. REEVES, PETITIONER,

vs.

**WILLIAM BEARDALL, AS EXECUTOR OF THE
LAST WILL AND TESTAMENT OF SUSAN J.
GRAHAM, DECEASED.**

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FIFTH CIRCUIT**

PETITION FOR CERTIORARI FILED JANUARY 6, 1942.

CERTIORARI GRANTED FEBRUARY 9, 1942.

INDEX

PAGE

Bill of Complaint	1
Exhibit "A"—Promissory Note, Susan J. Graham to order of Susie Graham Reeves, for \$15,- 000.00, dated 11/23/37	6
Exhibit "B"—Proof of Claim filed by Susie Graham Reeves, dated 4/12/40 against Estate of Susan J. Graham, deceased	7
Notation relative to Exhibits "A" and "B"	9
Exhibit "C"—Objections of Wm. Beardall, as Executor, to Claim of Susie Graham Reeves in case entitled "In Re: Estate of Susan Jordan Graham, deceased", Florida State Court	9
Exhibit "D"—Contract between Susan J. Graham and Susie Graham Reeves, dated 6/25/38	11
Exhibit "E"—Last Will and Testament of Susan J. Graham, dated 5/1/31	15
Exhibit "F"—Last Will and Testament of Susan J. Graham, dated 6/16/39	20
Exhibit "G"—Proof of Claim filed by Susie Gra- ham Reeves, dated 3/16/40 against Estate of Susan J. Graham, deceased	26
Notation relative to Exhibits "A" and "B"	28
Exhibit "H"—Objections of Wm. Beardall, as Executor, to Claim of Susie Graham Reeves in case entitled "In Re: Estate of Susan Jordan Graham, deceased", Florida State Court	28
Exhibit "I"—Receipt of Wm. M. Hamer to Mrs. Susan J. Graham, dated 4/1/39	29

INDEX—Continued

	PAGE
Summons issued 7/12/40 and Marshal's Return there- on (Omitted)	29
Motion of deft., Wm. Beardall, as Executor to dis- miss Count II of Bill of Complaint	30
Motion of deft., Wm. Beardall, as Executor to dis- miss Count III of Bill of Complaint	31
Order sustaining Motions of deft., Wm. Beardall, as Executor to dismiss Counts II and III of Bill of Complaint, etc.	34
Motion of Plaintiff for Re-Hearing	35
Notice of hearing on Motion for Re-Hearing	37
Amended Bill of Complaint	38
Motion of deft., Wm. Beardall, as Executor to strike amendment to Count II	41
Motion of deft., Wm. Beardall, as Executor for More Definite Statement	42
Motion of deft., Wm. Beardall, as Executor to dismiss the Complaint as amended as to Count II	43
Order granting Motion to strike Plaintiff's Amend- ment to Count II	45
Order dismissing Plaintiff's Complaint as to Count II and for entry of Final Judgment on Count II in favor of deft., Wm. Beardall, Executor ...	46
Final Judgment, entered 2/26/41	47
Notice of Appeal	48
Appellant's Designation of Contents of Record on Appeal	49
Appellant's Statement of Points on which to Rely on Appeal	51
Appellant's Amended Designation of Contents of Record on Appeal	53
Clerk's Certificate	54
Proceedings in U. S. C. C. A., Fifth Circuit	55
Order dismissing cause	55
Petition for rehearing	56
Order denying rehearing	60
Clerk's certificate (omitted in printing)	61
Order allowing certiorari	62

DISTRICT COURT OF THE UNITED STATES FOR THE
SOUTHERN DISTRICT OF FLORIDA.

Civil Action, File Number 72—Orl. Civil.

SUSAN G. REEVES,

Plaintiff,

against

WILLIAM BEARDALL, as Executor of the Last Will and
Testament of Susan J. Graham, deceased, and WIL-
LIAM M. HAMER,

Defendants.

1

COMPLAINT.

Filed Jul. 12, 1940, Orlando, Fla.

1. Plaintiff is a citizen of the State of New Jersey and defendants are citizens of the State of Florida. The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars (\$3,000.00).

Count I.

2. The late Susan J. Graham, the mother of the plaintiff and a resident of Orlando, Florida, on or about the 23rd day of November, 1927, executed and delivered to plaintiff a promissory note, dated November 23, 1927, a copy of which is hereto annexed as Exhibit A.

3. No payment has been made on account of said note or the interest thereon, and the amount of the note and the interest thereon have been since the date of said note and still are owing to plaintiff.

4. On or about the 15th day of April, 1940, the said Susan J. Graham, being the same person as Susan Jordan Graham, having died, plaintiff duly filed a proof of claim in a proceeding in the County Judge's Court of Orange County, Florida, in Probate entitled "In re Estate of Susan Jordan Graham, Deceased," a copy of which proof of claim is hereto annexed as Exhibit B, and said proof of claim was rejected by defendant William Beardall, the acting executor of the will of Susan J. Graham, deceased, on or about the 22nd day of May, 1940, a copy of said notice of rejection being hereto annexed as Exhibit C.

Count II.

5. The plaintiff repeats and realleges each and every allegation contained in paragraphs 2 and 3 of this complaint with the same force and effect as though herein again set forth in full.

6. On or about the 25th day of June, 1938, plaintiff and Susan J. Graham entered into a contract in writing, a copy of which is hereby annexed as Exhibit D.

7. In accordance with the provisions of said contract of June 25, 1938, plaintiff delivered to Susan J. Graham the securities set forth in Exhibit D and thereafter during the life of Susan J. Graham refrained from demanding or taking any steps to obtain payment of the note dated November 23, 1927, and interest thereon.

8. On or about the 1st day of May, 1931, Susan J. Graham made, published and declared as her last will and testament an instrument in writing, a copy of which is annexed hereto as Exhibit E, and said will had not been revoked or modified by her at the time of the execution of the contract of June 25, 1938, hereinabove referred to.

13

9. On or about the 16th day of June, 1939, Susan J. Graham, in violation of the terms of the said contract of June 25, 1938, made, published and declared as her last will and testament an instrument in writing, a copy of which is annexed hereto as Exhibit F.

10. On or about the 5th day of September, 1939, Susan J. Graham died at Orlando, Florida, being at that time a resident of Orange County, Florida, leaving plaintiff as her only surviving child.

11. On or about the 7th day of September, 1939, the County Judge's Court of Orange County, Florida, admitted to probate the will dated June 16, 1939, of which Exhibit F is a copy; and on or about the 7th day of September, 1939, William Beardall, one of the defendants herein, and named in said will as executor thereof, obtained and received letters testamentary by order of the County Judge of Orange County, Florida, and has not been removed or discharged as such executor.

12. On or about the 26th day of March, 1940, the said Susan J. Graham, being the same person as Susan Jordan Graham, having died, plaintiff duly filed a proof of claim in a proceeding in the County Judge's Court of Orange County, Florida, in Probate entitled "In re Estate of Susan Jordan Graham, Deceased", a copy of which proof of claim is hereto annexed as Exhibit G, and said proof of claim was rejected by the defendant William Beardall, as executor of the will of Susan J. Graham, deceased, on or about the 22nd day of May, 1940, a copy of his notice of rejection being hereto annexed as Exhibit H.

Count III.

13. The plaintiff repeats and realleges each and every allegation contained in paragraphs 5 to 12 inclusive of

this complaint with the same force and effect as though herein again set forth in full.

14. Susan J. Graham on or about the 1st day of April, 1929, delivered to defendant William M. Hamer who is the father-in-law of defendant William Beardall, the sum of \$19,000. for the purposes and upon the terms set forth in a receipt delivered to her by William M. Hamer, a copy of which is annexed hereto as Exhibit I. On information and belief, Susan J. Graham entrusted and/or delivered other and further monies and property to defendant William M. Hamer for purposes of investment, safe keeping for her account and/or as a loan or loans to defendant William M. Hamer, and on information and belief defendant William M. Hamer has never returned to Susan J. Graham nor delivered to William Beardall, her executor as aforesaid, nor repaid to either of them the said sum of \$19,000. or any other monies or property so entrusted or delivered to him or any part thereof, or any income therefrom, nor delivered to either of them any stocks, bonds or other securities or property purchased for Susan J. Graham with monies or property held for her, nor rendered any accounting of his disposition of any of said monies or property and the proceeds thereof and income therefrom although same has been duly demanded by plaintiff; and defendants have denied that there was any obligation owing by William M. Hamer to Susan J. Graham at the time of her death.

15. The assets comprising the estate of Susan J. Graham are substantially in excess of the sum of estate and other taxes, executor's commissions, all other expenses of administration, and all debts of Susan J. Graham owed at the time of her decease other than the obligations owed by her to the plaintiff by reason of the breach by Susan J. Graham of her contract with the plaintiff of June 25, 1938.

16. By virtue of the said contract between plaintiff and Susan J. Graham dated June 25, 1938, and the breach thereof by Susan J. Graham, as herein above set forth, plaintiff is entitled to the entire net estate of Susan J. Graham, and the denial by the defendants that defendant William M. Hamer owes any obligation to Susan J. Graham and the refusal of the defendant William M. Hamer to account to plaintiff, as herein above set forth, are hindering and delaying the collection and receipt by plaintiff of the monies and property justly due to her.

Wherefore, plaintiff demands: (1) judgment against the defendant William Beardall as executor of the will of Susan J. Graham for the sum of fifteen thousand dollars (\$15,000.) with interest thereon at the rate of five and one-half per cent. ($5\frac{1}{2}\%$) per annum from November 23, 1927; (2) that defendant be required specifically to perform the contract of June 25, 1938, by holding in trust to pay over to the plaintiff the assets of the estate of Susan J. Graham remaining on hand and in his possession after the payment of debts, taxes and due and proper expenses of administration; (3) that if specific performance is not granted, plaintiff have judgment against the defendant William Beardall as such executor for damages in the sum equivalent to the net assets of the estate of Susan J. Graham remaining in the hands of the defendant William Beardall after the payment of debts, taxes and due and proper expenses of administration; (4) that the Court order and direct the defendant William M. Hamer to render a complete and full account of his acts and proceedings with respect to all monies, stocks, bonds, securities and other property, real or personal, received by the defendant William M. Hamer from or for the account of Susan J. Graham; (5) in the event it shall appear from an account or accounts rendered by defendant William M. Hamer that there now is any money or other property owing, that he be ordered to pay over the same to the plaintiff and

that the plaintiff have judgment against him for the full amount thereof together with interest; (6) that the plaintiff have such other and further relief as to the Court may seem just and proper; and (7) that plaintiff have judgment against the defendants for costs.

(Signed) WILLIAM N. ELLIS,

Attorney for Plaintiff.

(Address) Orlando, Florida.

BURKE & BURKE,

Of counsel for Plaintiff.

72 Wall Street,

Borough of Manhattan,

New York, N. Y.

By JAMES B. BURKE.

7

EXHIBIT A.

\$15,000.

Summit, N. J. November 23, 1927.

On demand, for value received, I, the undersigned, promise to pay to the order of Susie Graham Reeves, at Hobart Avenue, Summit, N. J., Fifteen Thousand Dollars (\$15,000.) in United States gold coin or its equivalent, with interest from the date hereof, at the rate of five and one-half per centum per annum, having deposited with the said Susie Graham Reeves as collateral security for the payment of this note, or any note given in extension or renewal thereof, the following property owned by the undersigned; viz:

Two Hundred fifty (250) shares of the common stock of The Hunter Manufacturing and Commission Company.

On the non-performance of this promise, full power and authority is hereby given the said Susie Graham Reeves to sell, assign, transfer and deliver the whole of said

securities, or any part thereof, or any substitutes therefor or any additions thereto, at public or private sale, at such prices as she may deem best, and either for cash or on credit, or for future delivery, at the option of said Susie Graham Reeves, upon thirty days notice to the undersigned of the time and place of such sale, and if such collateral is disposed of at private sale, the said Susie Graham Reeves shall be relieved from all liability or claim for inadequacy of price. In case of sale for any cause, after deducting all expenses of any kind for collection, sale or delivery the said Susie Graham Reeves shall return the overplus, if any, to the undersigned, who agrees to be and remain liable to, and to pay the said Susie Graham Reeves for any deficiency arising upon such sale or sales. It is also agreed that the provisions, agreements, terms and conditions hereof shall apply to, and govern any and all notes given in extension or renewal of this note.

The above described property may from time to time by mutual consent, be exchanged for other property, which shall be held by said Susie Graham Reeves subject to all the terms of this note.

SUSAN J. GRAHAM.

9

EXHIBIT B.

In the County Judge's Court for Orange County, Florida,
In Probate.

In Re: The Estate of Susan Jordan Graham, Deceased.

Proof of Claim.

Comes now Susie Graham Reeves, whose place of residence and post office address is Hobart Avenue, Summit,

New Jersey, who, having been by me, the undersigned officer, first duly sworn, says that the estate of Susan Jordan Graham, deceased, is justly indebted to her in the amount of \$15,000. with interest thereon at the rate of 5-1/2% from November 23, 1927. For that on or about the 23rd day of November, A. D. 1927, the decedent, Susan Jordan Graham, for a valuable consideration, executed and delivered to this Claimant a demand promissory note in the amount of \$15,000. with interest at the rate of 5-1/2% per annum, no part of which has been paid. A true copy of the said note is annexed hereto and made a part hereof as Claimant's Exhibit "A", to which reference is prayed as often as may be necessary. Also annexed hereto and made a part hereof as Claimant's Exhibit "B", to which reference is prayed as often as may be necessary, is a true copy of a certain contract, dated the 25th day of June, A. D. 1936, executed by the decedent, Susan Jordan Graham, in which the said decedent acknowledged that the said debt evidenced by the said note was still due and owing.

That this Claimant has heretofore surrendered and delivered to the decedent the collateral security held by this Claimant for the faithful performance by the decedent of her obligations under the said note.

That by reason thereof this Claimant has been damaged and files this her Proof of Claim against the said estate of Susan Jordan Graham, deceased, and demands payment of said sum of \$15,000. with interest thereon at the rate of 5-1/2% from November 23rd, 1927, to date of payment.

Dated this 12th day of April, 1940.

S. G. R., SUSIE GRAHAM
REEVES.

Sworn to before me this 12 day of Apr., 1940.

(Seal)

THEODORE MUCHMORE.

My Commission Expires Feb. 17, 1942.

Note: Exhibits A and B herein referred to are identical to Exhibits A and D respectively of the complaint.

11

EXHIBIT C.

In the County Judge's Court, Orlando County, Florida.
In Re: Estate of Susan Jordan Graham, Deceased.

Objections to Claim of Susie Graham Reeves.

Now comes William Beardall, as executor in the above entitled estate, and files this his objection to the claim of Susie Graham Reeves, filed herein on April 15th, 1940, in the amount of \$15,000.00, with interest at the rate of 5-1/2% from November 23rd, 1927, and all sums claimed thereon, based on promissory note attached to the claim and marked Exhibit "A", and dated Summit, N. J., November 23rd, 1927, and purports on its face to be payable on demand, on the following grounds:

1. Said claim is barred by the statute of limitations.
2. Said note has been paid prior to the death of the said Susan Jordan Graham.
3. Said note has been satisfied and discharged by mutual agreement between the said claimant and Susan Jordan Graham prior to the death of the said Susan Jordan Graham.

4. Susan Jordan Graham did not execute the supposed receipt "Exhibit B".

5. The signature of the said Susan Jordan Graham to Exhibit "B" attached to the claim was obtained by misrepresentations, she being a very old land and her grandson, Richard Reeves, in whom she had great confidence, procured her to sign said document without her reading it, telling her it was merely a receipt, he being in a great hurry and rush, and rushing the said Susan Jordan Graham, and she signed same without knowing what was in it, and with no intention of acknowledging that she owed claimants any sum of money whatsoever.

6. The Exhibit "B" attached to proof of claim does not identify the indebtedness referred to.

Wherefore the executor objects to the allowance of said claim.

WM. BEARDALL,
Executor.

C. P. DICKINSON,
Attorney for Executor.

EXHIBIT D.

June 25, 1938.

11

Dear Susie:

This is to acknowledge receipt from you of the following securities, which Richard has today delivered to me:

Ctf. No.	Number of Shares or Principal Amount	Security.
49	400	Riverdale Mills preferred stock.
50	44	Riverdale Mills preferred stock.
46	45	Riverdale Mills preferred stock.
112	\$10,000.	Eastern Offices, Inc., 7% Gold Note.
	10,000.	Eastern Offices, Inc., 7% Gold Note.
324	\$1,000.	Eastern Offices, Inc., 7% Gold Note.
325	\$1,000.	Eastern Offices, Inc., 7% Gold Note.
326	\$1,000.	Eastern Offices, Inc., 7% Gold Note.
327	\$1,000.	Eastern Offices, Inc., 7% Gold Note.
328	\$1,000.	Eastern Offices, Inc., 7% Gold Note.
307	\$2,000.	Summit Title and Mortgage Guaranty Co., 1st Mtg. Participation Bond.
356499K	\$1,000.	U. S. Treasury Bond.

Ctf. No. Number of Shares or
Principal Amount

M2260	\$1,000.	2nd Mtg. Income Bond of Arizona Edison Company, Inc.
1659	\$1,000.	2nd Mtg. Income Bond of Arizona Edison Company, Inc.
36	\$1,000.	2nd Mtg. Income Bond of Arizona Edison Company, Inc.
4949	\$1,000.	Northern Pacific Ry. Co. 5's of 2047.
4947	\$1,000.	Northern Pacific Ry. Co. 5's of 2047.
4948	\$1,000.	Northern Pacific Ry. Co. 5's of 2047.
35	\$1,000.	Northern Pacific Ry. Co. 5's of 2047.
1660	\$1,000.	Northern Pacific Ry. Co. 5's of 2047.
4945	\$1,000.	Northern Pacific Ry. Co. 5's of 2047.
4946	\$1,000.	Northern Pacific Ry. Co. 5's of 2047.
EN32258	3 sha.	Northern Pacific Ry. Co. 5's of 2047.
AN53634	13 sha.	American Tel. & Tel. Co. Common stock.
RN80308	10 sha.	American Tel. & Tel. Co. Common stock.
NY011501	20 sha.	American Tel. & Tel. Co. Common stock.
83399	20 sha.	Electric Bond and Share preferred stock.
WTF225,594	10 sha.	Consolidated Gas Company of New York preferred stock.
0519385.	50 sha.	F. W. Woolworth Company common stock.
		Texas Corporation common stock.

Number of Shares or
Principal Amount

Ctf. No. 0517650
0656191
C125456
078603
C0593
023953
60
7
TNC 02005
SC803
TNC02000
C0129680
321958

30 sha.
13 sha.
50 sha.
11 sha.
15 sha.
2 sha.
250 sha.
25 sha.
55 sha.
750 sha.
1 sha.
50 sha.
10 sha.

Security.
Texas Corporation common stock.
Texas Corporation common stock.
Standard Oil Company of New Jersey capital stock.
Drug Incorporated common stock.
The Reinsurance Corporation of New York common stock.
Mission Corporation common stock.
Eastern Offices, Inc., common stock.
Southern Cotton Mills.
United States Stores Corporation common stock.
United States Stores Corporation common stock.
United States Stores Corporation common stock.
Standard Brands Incorporated common stock.
Atchison, Topeka & Santa Fe Ry. Co. common stock.

I have had a talk with Richard about my affairs and our relations, and I have in mind my present obligation to you on the note in your favor for \$15,000. and interest, which I signed several years ago, and which is now past due. He tells me that you have no intention of asking me to pay this note right now, but since I still owe this obligation, I am writing to state that in consideration of your not asking for payment of my obligation right now and in consideration of the delivery of the securities mentioned above to me and of your assistance in having cared for these securities and placed in my account at The Summit Trust Company all the income which I have received from them during the past several years, I shall hold these securities and not make any disposition of them without first telling you and obtaining your written advice and consent.

As I think you know, I executed my Will on May 1, 1931. I have not changed my Will since then, and in further consideration of your delivery of the securities listed above to me and your willingness not to ask for payment of the note at the present time, I agree not to make any disposition of my property by Will or otherwise contrary to the provisions of my Will of May 1, 1931, without your written approval, and to execute such further Will or Codicil as might from time to time be necessary to accomplish this purpose.

I understand that with the foregoing agreement on my part you are turning over all my securities to me and that you have indicated your assent to our understanding as set forth by signing this letter and a copy thereof. To evidence my consent to the agreement as set forth, I am also signing an original and copy of this letter and delivering the original to Richard to take back to you.

I have asked Richard to stamp on the securities a legend covering this understanding between us.

SUSAN J. GRAHAM.

Witness:

RICHARD E. REEVES.

The foregoing constitutes my agreement with my mother as to the delivery of these securities to her.

SUSIE GRAHAM REEVES.

Witness:

M. R. REEVES.

16

EXHIBIT E.

In the Name of God, Amen:

I, Susan J. Graham, of Orlando, Florida, being of sound and disposing mind and memory, do hereby make, publish, and declare this instrument as and for my Last Will and Testament as follows:

• First: I order and direct that all my just debts, including taxes upon real property and funeral expenses, be paid as soon as may be convenient after my decease.—

Second: I give and bequeath to my beloved daughter, Susie Graham Reeves, of Summit, New Jersey, absolutely and forever, all my jewelry, watches, personal ornaments, wearing apparel, silver and silverware, books, pictures, objects of art, musical instruments, furniture, and all other articles of household and personal use, automobiles and accessories thereof, horses, carriages and appurtenances.—

Third: One-half of all the rest, residue and remainder of my estate of whatsoever nature and wheresoever situate, including any property over which I have any power

of appointment, I give, devise, and bequeath to my beloved daughter, Susie Graham Reeves, her heirs and assigns, absolutely and forever; and in the event that my said daughter shall have predeceased me, I give the said one-half rest, residue, and remainder of my estate to my granddaughter, Susan Robertson Reeves, her heirs and assigns, absolutely and forever, and in the event that both my said daughter and my said granddaughter shall have predeceased me, then I give the said one-half rest, residue, and remainder of my estate to such person or persons, their heirs and assigns, as would then be the heirs at law of my said daughter, under the laws of the State of New Jersey, in such parts, shares, and proportions as they would inherit as such heirs at law.—

Fourth: If my beloved son, Allen J. Graham, shall survive me, I give, devise, and bequeath the remaining one-half portion of all the said rest, residue, and remainder of my estate to my Trustee hereinafter named, In Trust Nevertheless, upon the following terms and conditions:—

To enter upon, take, hold, manage, invest, and reinvest said one-half portion of the rest, residue, and remainder of my estate, and to collect and receive the income, rents, issues, and profits thereof, and to dispose of the same as follows:

a. To hold the said one-half portion in trust for my said son, Allen J. Graham, and to pay over the net annual income therefrom in quarter-annual payments, together with all accumulations, to my said son for and during the term of his natural life; and I authorize and empower my Trustee hereinafter named to apply all or any part of the principal of said one-half portion to the support and maintenance of my son, if in the sole discretion of my Trustee such application of the principal of the said one-half portion is necessary or advisable.—

b. Upon the death of my said son to pay over the principal of the said one-half portion as the same shall then be to my beloved daughter, Susie Graham Reeves, absolutely and forever, and in the event that my said daughter shall survive me but shall have predeceased my said son, to pay over the principal of the said one-half portion to my granddaughter, Susan Robertson Reeves, absolutely and forever, and in the event that both my said daughter and my said granddaughter shall have predeceased my said son, then to pay over the principal of said one-half portion to such person or persons, their heirs and assigns, as would then be the heirs at law of my said daughter, under the laws of the State of New Jersey, in such parts, shares, and proportions as they would inherit as such heirs at law.—

Fifth: In the event that my said son, Allen J. Graham, shall have predeceased me I give, devise, and bequeath the said remaining one-half portion of all the rest, residue and remainder of my estate to my daughter, Susie Graham Reeves, her heirs and assigns, absolutely and forever; and in the event that she shall have predeceased me, then I give, devise, and bequeath said one-half portion to my granddaughter, Susan Robertson Reeves, her heirs and assigns, absolutely and forever, and in the event that both my said daughter and my said granddaughter shall have predeceased me, then and in that event I give, devise, and bequeath the same to such person or persons, their heirs and assigns, as would at the date of my death be the heirs at law of my daughter, Susie Graham Reeves, under the laws of the State of New Jersey, and in such parts, shares, and proportions as they would inherit as such heirs at law.—

Sixth: I authorize and empower my Executor and Trustee hereinafter named to continue to hold any real or personal property of which I may die possessed, whether

the same be legal for the investment of trust funds or not, for such time as she shall determine to be wise in her full discretion, with full power to vote in person or by proxy upon any stocks or votable securities, and to protect, by the expenditure of income or other capital moneys belonging to the trust, or by joining in any reorganization plan, or by exchange, or otherwise, any stocks, bonds or other securities of any nature so held by her, but upon all reinvestments it is my will that my said Executor and Trustee shall invest in such securities as are legal for the investment of trust funds under the laws of the State of New York. I authorize and empower my said Executor and Trustee to defend any proceedings of any nature as she may deem necessary or proper in connection with any matter relating to my estate or the trust hereby created, and to compromise, settle, and adjust any and all claims, judgments and causes of action in favor of or adverse to my estate or the trust estate herein established, and in any way relating thereto, whether or not such compromise may involve the payment by her of moneys out of the income or principal of my estate or the trust property; to execute all documents whether under seal or otherwise, and to do all acts and things, either personally or by agents, delegates or attorneys which she may deem necessary or proper in the execution of the duties of the trust, hereby created.

Seventh: I hereby direct my said Trustee to treat, as between any life tenant and remainderman, all investments as being made at the actual price at which such investments shall have been purchased or made, neither allowing for premiums on the one hand nor discounts on the other, but paying all actual income directly to those entitled to receive income and making no division thereof as between them and the remaindermen. I further direct that all cash dividends shall be regarded and treated as income and that all stocks or scrip dividends or rights to

subscribe for stock shall be regarded and treated as principal.—

Eighth: I direct that any legacy, succession, inheritance, transfer or estate tax that may be lawfully imposed by any State or other legal authority upon any bequest or devise herein, or any transfer thereof, be paid out of the residue of my estate and that the same shall not be chargeable to or paid by any division or legatee named herein except as residuary legatees or devisees may be affected thereby.—

Ninth: I nominate and appoint my daughter, Susie Graham Reeves, of Summit, New Jersey, as the sole Executor of and Trustee under this my Last Will and Testament, and I direct that no bond or surety shall be required of her as such Executor and/or Trustee. In the event that my said daughter shall predecease me or fail to qualify as such Executor and/or Trustee, I nominate and appoint my grandson, Richard Early Reeves, of Summit, New Jersey, and The Central Farmers Trust Company of West Palm Beach, Florida, Executors of and Trustees under this my Will with the same powers as I have given to my said daughter as such Executor and Trustee, and I direct that no bond or surety shall be required of them or either of them as such Executor and Trustee.—

Tenth: I hereby revoke all other Wills and Codicils by me heretofore made.—

In Witness Whereof I, the said Susan J. Graham, have hereunto set my hand and seal at the City of New York, State of New York, this 1st day of May, One Thousand Nine Hundred Thirty-One.

SUSAN J. GRAHAM, (L. S.)

Witnesses:

DANIEL BURKE,
JOHN H. SCHMID,
JAMES BUNDY BURKE.

The foregoing instrument, consisting of three type-written pages, including this page, was on the 1st day of May, 1931, at the City of New York, State of New York, sealed, subscribed at the end, published and declared in the presence of each of us by the Testatrix, Susan J. Graham, to be her Last Will and Testament, and at the same time we and each of us at the request of said Testatrix, in her presence, and in the presence of one another, after hearing this attestation clause read aloud in an audible tone of voice, hereunto subscribed our names and places of residence as attesting witnesses at the end of the Will.

Daniel Burke, residing at Oxford Chenango Co. N. Y.

John H. Schmid, residing at 45 Elston Road, Upper Montclair, N. J.

James Bundy Burke, residing at Oxford, Chenango Co., N. Y.

19

EXHIBIT F.

Last Will and Testament.

In the Name of God, Amen:

I, Susan Jordan Graham, of the City of Orlando, County of Orange and State of Florida, which I hereby declare to be my place of legal domicile, after long and careful thought, free from the influence of any person or persons, whomsoever, Do Hereby Make, Publish And Declare this as and for my Last Will And Testament.

First: I direct the payment of my just debts, including my funeral expenses and the costs of a suitable marker

for my grave, as soon after my death as may be practicable.

Second: For reasons made known to those most directly interested and concerned more than one year prior to the date of this Will, I Do Hereby Revoke and Make Null And Void any and all former Wills and testamentary dispositions by me made, including especially that certain Will bearing my signature and dated May 1, 1931, which was executed without my full knowledge of its provisions and contents.

Third: All of my property and estate of whatsoever kind and character and wheresoever situated of which I may die seized or possessed or to which I may be in any manner justly entitled at the time of my death, I Give, Devise And Bequeath to Wm. Beardall, As Trustee,—to be had and held by him in trust for a period of ten (10) years from the date of my death, for the following uses and purposes and none others, namely:

(a) In trust, to hold, manage and control the same, to collect all the rents, issues, income and profits therefrom; to pay all taxes, insurance charges, necessary repairs and all other proper expenses connected therewith, with full power, from time to time, to sell, mortgage, lease or otherwise dispose of any part or all of my property and estate, as in his best judgment and discretion it may be expedient and advantageous to do, and to execute and deliver proper conveyances and such other instruments as may be necessary for the purposes aforesaid, without liability upon the part of any purchaser or mortgagee to see to the application of the said purchase or mortgage money. All proceeds of any sale or sales of my property to be reinvested from time to time as judiciously, advantageously and securely as my said Trustee may be able to do. In general, my said Trustee shall have every pow-

er and authority over my trust estate that he would have if he were the absolute owner thereof and the enumeration of specific powers shall not be taken to restrict the general powers and authority herein given, and the decision of my said Trustee shall be final and not subject to question by any beneficiary of the trust hereby created.

(b). In further trust to pay over, at the end of said Ten (10) years, whatever remains of my said trust estate and the accruals thereto, if any, to my grand-daughter, Susan Graham Reeves and my grand-son, C. E. Graham Reeves, of Summit, New Jersey, share and share alike, and no part of said trust estate to be at any time or in any manner subject to the payment of any indebtedness of my said grand-daughter and said grandson, whether existing at the time of my death or arising subsequently, either wholly or as to any part thereof, or to any assignment, conveyance, mortgage, pledge, legal process against her or him or any other form of alienation by them, voluntary or involuntary.

(c) In the event of the death of either one of my said grand-children before my death or before the distribution of my estate under the terms of this trust, the share he or she would have taken shall go to his or her children, or if there be no children, then to the survivor of my said grand-children named herein.

(d) In the event that both of my said grand-children named herein shall die before my death or before the distribution of my estate under the terms of this trust, leaving no children or issue of children, then and in that event, my trust estate shall go to such of my grand-children who may be living at that time.

Fourth: I hereby instruct my Executor or Trustee, as the case may be, that the purported contract or claim

which my daughter, Susan Graham Reeves, or her children pretend to have is absolutely Null And Void and obtained through fraud, deceit and surprise, and without consideration; and my said daughter and her attorneys and those interested have been so advised, and I have placed in my Attorney's hands all the evidence and papers necessary to refute said purported contract or claim.

(a) If my said daughter or any of my grand-children, or any of the cestui que trust under this Will should press or attempt to enforce the said purported contract or claim, or shall contest the validity of this my Will, or attempt to vacate the same or alter or change any of the provisions, or hinder, delay or embarrass my Executor or Trustee in carrying out the other provisions of this my Will, he or she or they shall be entitled deprived of any beneficial interest under this Will and of any share of my estate, and the share or shares of such person or persons shall be disposed of by my Executor or Trustee, as the case may be, in fee simple, either by sale, outright gift or otherwise, to whom he may wish or think worthy, but not to himself, free and discharged from this trust.

(b) If there shall be any attempt made to contest this Will or violate any of the conditions set out in subparagraph (a), above, then I authorize and direct my Executor or Trustee, as the case may be, to resist such attempt or violation and to pay the expense thereof out of my general estate or trust fund; but none of the expense of those so contesting this Will shall be paid out of my estate.

Fifth: I hereby nominate and appoint Wm. Beardall, to be the Trustee of this my last Will and Testament. I hereby nominate and appoint Wm. Beardall to be the Executor of this my last will and testament, and I hereby give to him and invest him with such powers over and

such title to and such interest in my entire estate and every portion thereof as it may be desirable or convenient for him to have for the Complete Execution Of This, My Will.

(a) I further direct and request that no bond shall be required of my said Executor and Trustee in any jurisdiction in which he may be called upon to qualify or act.

(b) Upon the acceptance and qualifying as my Executor and as my Trustee by Wm. Beardall, it is my desire and order that he name, within five (5) days, such a one as he may elect to serve as his successor executor and trustee, in the event he becomes incapacitated, unwilling or unable to serve. This right, authority and privilege in pre-naming his successor shall extend to and be binding in the same manner on all successor executors and trustees so appointed, and all successor executors and trustees so appointed shall have full power and authority to carry out all of the terms and conditions of this my Last Will and Testament..

Sixth: I direct that my Executor, Wm. Beardall, and his successors shall receive as compensation for his services Five percent (5%) of the appraised valuation of my estate and as compensation for the services as Trustee, he shall receive Three percent (3%) of the gross annual income collected by him, which compensation shall in no event be less than One Hundred Dollars (\$100.00) per month, and such compensation shall be a charge upon the income as well as upon the corpus of my estate.

Seventh: It is my request that my Executor and Trustee associate with himself one (1) and not more than two (2) persons, in whom he has confidence, for the purpose of advice and the protection of his name in the handling

and settlement of my estate. Such associates shall be subject, by written notice, to removal by him at any time of they should decline to act or in his judgment prove objectionable. Those persons so elected shall receive as compensation for their services Two percent (2%) of the appraised value of my estate and Two percent (2%) of the gross annual income of my trust estate so long as they shall so act.

In Witness Whereof, I, Susan Jordan Graham, have hereunto set my hand and subscribed my name to this my Last Will and Testament, containing five (5) typewritten sheets of paper, written on one side, each bearing on the margin my signature; on this 16th day of June A. D. 1939.

(Seal)

SUSAN JORDAN GRAHAM.

The preceding instrument, consisting of this and four (4) other tyewritten pages, each signed in the magin by the testator, was on the day of the date thereof subscribed by Susan Jordan Graham, the testator therein named, in our presence, who thereupon declared the same to be her Last Will And Testament and requested us to become witnesses thereto, whereupon we, in her presence and in the presence of each other subscribed our names thereto as witnesses.

C. G. GRIDLEY,

Address: Orlando, Florida.

HENRY J. WILDER,

Address: Orlando, Florida.

RÁNDOLPH H. COBB,

Address: Orlando, Florida.

EXHIBIT G.

In the County Judge's Court, for Orange County, Florida.

In Probate.

In Re: The Estate of Susan Jordan Graham, Deceased.

Proof of Claim.

Comes now Susie Graham Reeves, whose place of residence and post office address is Hobart Avenue, Summit, New Jersey, who, having been by me, the undersigned officer, first duly sworn, says that the estate of Susan Jordan Graham, deceased, is justly indebted to her to the full extent of the net assets thereof. For that, on or about the 25th day of June, A. D. 1938 the decedent, Susan Jordan Graham, for a valuable consideration, entered into a certain contract or agreement with the undersigned claimant, Susie Graham Reeves, under the terms and conditions of which the said Susan Jordan Graham expressly stipulated and agreed, among other things, not to change the provisions of her Last Will and Testament previously and on May 1st, 1931 by her executed, and then in effect. A true copy of the said contract is annexed hereto and made a part hereof as Claimant's Exhibit "A", to which reference is prayed as often as may be necessary. Also annexed hereto and made a part hereof as Claimant's Exhibit "B", to which reference is prayed as often as may be necessary, is a true copy of the said Last Will and Testament of the said Susan Jordan Graham, deceased, dated May 1st, 1931, which is the said Last Will and Testament referred to in the said contract attached hereto as Claimant's Exhibit "A".

That at the time of the decedent's death her son, Allen J. Graham, referred to in the said Last Will and Testa-

ment of May 1st, 1931, was not living; so that pursuant to the provisions of the Last Will and Testament this claimant, Susie Graham Reeves, would have been entitled to receive the entire estate of the decedent.

That on or about the 16th day of June, 1939, in violation of the said contract of June 25th, 1938, the said decedent, without this complainant's written approval, executed a new Last Will and Testament in which she made no provision or provisions for this claimant, but on the contrary expressly attempted to revoke and annul the said Last Will and Testament of May 1st, 1931. That the said Will of June 16th, 1939 has been admitted to probate in the County Judge's Court for Orange County, Florida, and one William Beardsall of Orlando, Florida, has been duly appointed and has qualified as Executor thereunder.

That because of the breach of the said contract of June 25th, 1938 by the said Susan Jordan Graham, deceased, this claimant has been damaged by the loss of the entire net estate of the said decedent, for which the estate of the said decedent is liable, and for which this claimant files this her Proof of Claim against the said estate of Susan Jordan Graham, deceased, and demands that the assets of the said estate remaining on hand and in the possession of the said Executor after the payment of debts, reasonable costs, taxes and expenses of administration, be delivered to this claimant pursuant to the terms and provisions of the contract herein referred to and the Last Will and Testament of May 1st, 1931; to which the said contract had reference.

Dated this 16th day of March, A. D. 1940.

SUSIE GRAHAM REEVES.

Sworn to and subscribed before me this 16th day of March, A. D. 1940.

THOS. J. TEDDER,
Notary Public.

Note: Exhibits A and B herein referred to are identical to Exhibits D and E respectively of the complaint.

27

EXHIBIT H.

In the County Judge's Court, in and for Orange County,
Florida. In Probate.

In Re: The Estate of Susan Jordan Graham, Deceased.

Objections to Claim of Susie Graham Reeves.

Now comes William Beardall, as executor in the above entitled estate, and objects to the claim of Susie Graham Reeves filed herein on the 26th day of March, 1940, wherein the said Susie Graham Reeves claims the entire estate of Susan Jordan Graham, because of a certain alleged contract dated the 25th day of June, 1938, wherein it is claimed that the said Susan Jordan Graham had agreed not to change a certain will, dated May 1st, 1931, under which the said Susie Graham Reeves now claims she would succeed to the entire estate of Susan Jordan Graham, and that in making the will probated in this cause, the said Susan Jordan Graham violated said contract, and the executor objects to said claim because:

1. Same is not a just and valid claim.
2. The contract on which the said claim is based is null and void and illegal and not supported by any consideration.
3. That said contract was procured by one Richard Reeves, son of Susie Reeves, at the instance of said Susie Graham Reeves, by a fraud, covin and deceit, wherein the said Susan Jordan Graham was lead to believe, by

false and fraudulent statements made by the said Richard Reeves, to sign her name to said document that same was nothing more than a receipt for the property referred to therein, and the said Susan Jordan Graham being at that time a very old lady, approximately 75 years of age, and who placed implicit trust and confidence in the said Richard Reeves, who was her grandson and whom she idolized.

That Susan Jordan Graham in her lifetime was not indebted to or obligated to or liable in any manner whatsoever to claimant Susie Graham Reeves in any sum whatsoever, on any account.

WM. BEARDALL,

As Executor of the Estate of
Susan Jordan Graham.

C. P. DICKINSON,

Attorney for Executor.

29

EXHIBIT I.

Orlando, Fla. April 1st, 1929.

Receipt.

Received of Mrs. Susan J. Graham her check drawn on Orlando Bank & Trust Company in amount of nineteen thousand dollars for investment for her account. In duplicate.

WM. M. HAMER.

(Wm. M. Hamer)

30

SUMMONS ISSUED 7/12/40 AND MARSHAL'S RETURN THEREON, omitted from the printed record, pursuant to Rule 23 of this Court.

MOTION TO DISMISS AS TO COUNT No. II.

32

Filed Aug. 3, 1940, Orlando, Fla.

(Title Omitted.)

Defendant William Beardall, as executor, moves to dismiss Count No. II because:

1. There was no consideration for the agreement numbered Exhibit D. and made a part of Count II.

2. Under the statute of the State of Florida any person is authorized to revoke a will at any time by express provision of statute and the contract was therefore null and void.

3. There was no mutuality in the contract referred to as Exhibit D.

4. There is no showing that Susan G. Reeves is entitled alone to attack the execution by Susan J. Graham of her last will and testament dated the 16th of June, 1939.

5. Count No. II does not show any valid subsisting agreement entered into by and between plaintiff and Susan J. Graham so as to prevent her, the said Susan J. Graham, from executing a will at any time and revoking any and all former wills, including the will dated the 1st of May, 1931.

6. It appears on the face of the pleadings in Count No. II that there are other parties interested in the will of Susan J. Graham of May 1, 1931, and they are not parties to this proceeding.

7. The alleged contract attached as Exhibit D is too uncertain and indefinite for specific performance.

8. The alleged contract attached and made a part of this count is so uncertain and indefinite that the Court could not frame an appropriate decree thereon for purposes for which same is sought to be used.

9. The proceedings under this count are in effect nothing more than a suit to set aside and cancel the will of Susan J. Graham probated in the Probate Court, Orange County, Florida, and this Court has no jurisdiction of such proceedings as a matter of procedure or substantive law.

10. Plaintiff is not entitled to recover damages against the estate of Susan J. Graham for executing the will of June, 1939, and plaintiff has not shown nor alleged any state of facts authorizing the recovery of damages by plaintiff against the estate of Susan J. Graham.

34 MOTION TO DISMISS AS TO COUNT III.

Defendant William Beardall, as executor, moves to dismiss as to Count III of the complaint because:

1. There was no consideration for the agreement numbered Exhibit D, and made a part of Count II.

2. Under the statute of the State of Florida any person is authorized to revoke a will at any time by express provision of statute and the contract was therefore null and void.

3. There was no mutuality in the contract referred to as Exhibit D.

4. There is no showing that Susan G. Reeves is entitled alone to attack the execution by Susan J. Graham of her last will and testament dated the 16th of June, 1939.

5. Count No. III does not show any valid subsisting agreement entered into by and between plaintiff and Susan J. Graham so as to prevent her, the said Susan J. Graham, from executing a will at any time and revoking any and all former wills, including the will dated the 1st of May, 1931.

6. It appears on the face of the pleadings in Count No. III that there are other parties interested in the will of Susan J. Graham of May 1, 1931, and they are not parties to this proceeding.

7. Susan G. Reeves has not stated such a cause as shows her to be entitled to the entire estate of Susan J. Graham.

8. Same shows on its face that the alleged contract was without any mutuality or consideration whatsoever.

9. The alleged contract attached as Exhibit D is too uncertain and indefinite for specific performance.

10. The alleged contract attached and made a part of this count is so uncertain and indefinite that the Court would not frame an appropriate decree thereon for purposes for which same is sought to be used.

11. The proceedings under this count are in effect nothing more than a suit to set aside and cancel the will of Susan J. Graham, probated in the Probate Court, Orange County, Florida, and this Court has no jurisdiction of such proceedings as a matter of procedure or substantive law.

12. Plaintiff is not entitled to recover damages against the estate of Susan J. Graham for executing the will of June, 1939, and plaintiff has not shown nor alleged any state of facts authorizing the recovery of damages by plaintiff against the estate of Susan J. Graham.

(Signed) C. P. DICKINSON,

Attorney for Defendant William Beardall, as Executor of the Last Will and Testament of Susan J. Graham, Deceased.

Proof of Service.

State of Florida,
County of Orange.

C. P. Dickinson, being first duly sworn, says that he deposited on the 3 day of August, 1940, a true copy of the foregoing Motion to Dismiss in the Post Office at Orlando, Florida, in an envelope securely sealed, bearing sufficient postage to cover mailing charges, and addressed to Mr. William N. Ellis, Attorney at Law, Orlando, Florida, who is the attorney for the plaintiff in the above entitled cause.

(Signed) C. P. DICKINSON,

Sworn to and subscribed before me this 3rd day of August, 1940.

BETTY GUERNSEY,

(Notarial Seal)

Notary Public, State of
Florida.

My Commission Expires: Jan. 6, 1941.

ORDER ON MOTION TO DISMISS AS TO WILLIAM
BEARDALL AS EXECUTOR.

36

Filed Dec. 5, 1940, Orlando, Fla.

Orl. C. O. B. 1-424.

(Title Omitted.)

On hearing this day held after notice to counsel and argument on the motion of William Beardall as executor, to dismiss the complaint as to counts two and three:

It is Ordered and Adjudged that the motion of defendant William Beardall as Executor to counts two and three to dismiss said counts be, and the same is hereby sustained.

Plaintiff is allowed until the first Monday in January, 1941, to amend as to said counts two and three as to William Beardall as executor as she sees fit.

On the failure of plaintiff to amend said counts two and three as to William Beardall as executor within the time herein stated, this cause shall stand dismissed with prejudice as to said counts two and three as to William Beardall as executor and final judgment entered therein in his favor.

Done and Ordered this December 4, 1940.

(Signed) ALEXANDER AKERMAN,
District Judge.

37

MOTION FOR REHEARING.

Filed Dec. 14, 1940, Orlando, Fla.

(Title Omitted.)

Comes now the Plaintiff by William N. Ellis and James B. Burke, her solicitors, and would show unto this Honorable Court that on December 4th, 1940, after argument by counsel, two certain orders were entered by this Court sustaining defendants' Motions to Dismiss the complaint as to William M. Hamer and to dismiss counts two (2) and three (3) of the said Complaint as to William Beardall, as Executor of the Last Will and Testament of Susan J. Graham, deceased. Plaintiff would further show that there was error of law in entering the said orders in that the Court did not take into consideration the following principles of law:

1. As to the defendant William M. Hamer the Complaint shows that the plaintiff is claiming the entire net estate and not just a portion thereof and that under such circumstances, the personal representative of the said estate is not a necessary party, nor under such circumstances is it necessary to make demand upon the personal representative to collect the claim alleged to be due the estate, nor to show circumstances such as would make demand upon the personal representative a futile gesture.

2. As to the defendant William Beardall, as Executor and so forth, and the order dismissing the second and third counts of the Complaint, the plaintiff would show that the contract in question shows on its face a valid consideration inuring to the benefit of the decedent Susan J. Graham, to-wit: Forbearance on the part of the plaintiff to demand payment of the promissory note in

question; and consideration inuring to the benefit of the plaintiff, to-wit: The agreement of the deceased not to change an existing will; that the consideration on the part of the plaintiff had been completely performed, under which circumstances the agreement of the deceased will be enforced.

Plaintiff would further show that a material question of law was not considered by the Court in finding that plaintiff's forbearance to sue or to demand payment was not for a stated length of time, whereas plaintiff would show that the weight of authority is to the effect that forbearance to sue or to demand payment for an unstated time is presumed to mean a reasonable time.

Wherefore plaintiff would show that the said contract was supported by a mutual valid consideration, completely executed by plaintiff and that plaintiff's agreement to forbear was an agreement to forbear for a reasonable time.

Wherefore, for the said errors of law committed plaintiff respectfully prays that she be granted a rehearing in said cause.

WILLIAM N. ELLIS,
JAMES BURKE,
Solicitors for Plaintiffs.

State of Florida,
County of Orange.

On this day personally appeared before me, the undersigned authority, William N. Ellis, who having been by me first duly sworn, deposes and says:

1. That he is of counsel for the plaintiff in the foregoing cause; and

2. That the matters and things set forth in the foregoing Motion are true.

WILLIAM N. ELLIS.

Subscribed and sworn to before me this 14th day of December, A. D. 1940.

CORA LEE CUMBIE
(NEE BEASLEY),

(Notarial Seal)

Notary Public, State of
Florida at Large.

My Commission Expires July 5, 1941.

40

NOTICE OF HEARING.

(Title Omitted.)

To: Hon. C. P. Dickinson, Attorney for Defendant William Beardall, as Executor of the Last Will and Testament of Susan J. Graham, Deceased, and Hon. Hugh Akerman, Attorney for Defendant William M. Hamer, Orlando, Florida:

You will please take notice that on Tuesday, December 17th, A. D. 1940, at ten o'clock (10:00) in the forenoon, I shall apply to the Honorable Alexander Akerman, in his chambers at Orlando, Florida, for a hearing in the above entitled cause. A copy of said Motion is hereto attached.

Dated this 14th day of December, A. D. 1940.

WILLIAM N. ELLIS,
Attorney for Plaintiff.

We hereby acknowledge receipt of a true copy of the foregoing Notice and Motion this 14 day of December, A. D. 1940.

C. P. DICKINSON,
Attorney for Defendant William Beardall, as Executor,
etc.

HUGH AKERMAN,
Attorney for Defendant William M. Hamer.

41

AMENDMENTS TO COMPLAINT.

Filed Jan. 13, 1941, Orlando, Fla.

(Title Omitted.)

Comes now the Plaintiff by her attorneys of record pursuant to the Order of Court heretofore entered and amends her original Complaint as herein filed in the following particulars, to-wit:

Amendment to Count II.

Plaintiff amends Count II of the original Complaint by omitting paragraph six (6) of the said Count appearing on page two (2) and in lieu thereof alleges:

6. That on or about the 25th day of June, 1938, for valuable considerations mutually received, plaintiff and Susan J. Graham entered into a contract in writing, a copy of which is hereto annexed as Exhibit D. While no date was specifically stated in this contract to define an exact limit of time during which the plaintiff was to for-

bear suit, the plaintiff and Susan J. Graham intended by this contract to create an obligation on the part of the plaintiff not to press for payment by Susan J. Graham of the said note (Exhibit A) so long as Susan J. Graham did not change her will or sell her securities without the consent of the plaintiff, and it was their mutual understanding that such was the meaning and purport of the terms of the contract (Exhibit D) as executed. These mutual obligations and the considerations therefor as herein set forth were orally stated and agreed to by and between plaintiff and Susan J. Graham at the time of the execution of the contract (Exhibit D).

The Exhibits referred to are those annexed to the original Complaint.

Amendment to Count III.

Plaintiff amends Count III by adding to paragraph fourteen (14) immediately following the last sentence thereof, the following paragraph, to-wit:

While no formal demand has been made by plaintiff upon defendant Beardall to bring suit against defendant Hamer with regard to any obligation owing by him to the estate of the last Susan J. Graham or to those entitled to said estate by reason of the foregoing, the making of such formal demand by the plaintiff would have been futile for the following reasons: Defendant William Beardall has permitted the limitation for administering the estate to expire without taking any action against defendant William M. Hamer; he has refused the plaintiff's request to demand an explanation or accounting from William M. Hamer as to the latter's financial relations with Susan J. Graham or to accompany one of the plaintiff's attorneys to William M. Hamer's office for the purpose of discussing the matter; he has refused to show to plaintiff's attorneys any statements covering the

financial relations between Susan J. Graham and defendant William M. Hamer although not denying their existence and has refused to divulge any information as to or reason for his refusal to recognize the existence or possible existence of any debt or obligation due by defendant William M. Hamer to the estate of the late Susan J. Graham or to those entitled thereto; and, furthermore, at conferences with the attorneys for the plaintiff he has stated that any suggestion of such obligation owing by William M. Hamer is altogether unfounded, vehemently and indignantly denying the existence thereof and adopting an attitude of almost personal affront that such suggestions were made with regard to his father-in-law.

The exhibits, referred to are those annexed to the original Complaint.

Plaintiff further amends her complaint by omitting the fifth (5th) prayer appearing at the bottom of page five (5) and adding in lieu thereof the following prayer, to-wit:

(5) In the event it shall appear from an account or accounts rendered by defendant William M. Hamer that there now is any money or other property owing, that he be ordered to pay over the same to the plaintiff or to the Executor in trust for the plaintiff, and that judgment be entered against the said William M. Hamer for the full amount thereof, together with interest thereon.

(Signed) WILLIAM N. ELLIS,
Attorney for Plaintiff.

(Address)

Orlando, Florida.

BURKE & BURKE,

Of Counsel for Plaintiff,

By JAMES BURKE.

72 Wall Street,

Borough of Manhattan,

New York, N. Y.

Received copy of the foregoing Amendment this 12th day of January, A. D. 1941.

.....
Attorney for Defendant William Beardall, as Executor, etc.

HUGH AKERMAN,
Attorney for Defendant William M. Haller.

MOTION TO STRIKE AMENDMENT TO COUNT TWO.

45 Filed Jan. 21, 1941, Orlando, Fla.

(Title Omitted.)

The defendant, William Beardall, as Executor of the Last Will and Testament of Susan J. Graham, deceased, by counsel moves the Court to strike amendment to Count Two filed herein on the following grounds:

1. The matter set up therein is immaterial, redundant and irrelevant to the issues in the case.
2. Same attempts to set up only the construction placed on the contract referred to by the plaintiff.
3. Same is merely the conclusions of plaintiff as to the meaning and understanding on her part of the contract.
4. Same constitutes only an argument.

Further Motion.

And this defendant further moves the Court to strike all of the amendment to Count Two filed herein except

the first sentence separately and assigns the same grounds as above set out for striking the whole amendment.

C. P. DICKINSON,

Attorney for Defendant

William Beardall.

Mezzanine-Annex to O. B. & T. Building,
Orlando, Florida.

MOTION No. TWO.

MOTION FOR MORE DEFINITE STATEMENT.

46.

Filed Jan. 21, 1941, Orlando, Fla.

(Title Omitted.)

The defendant, William Beardall, as Executor of the Last Will and Testament of Susan J. Graham, deceased, moves the Court to require the plaintiff to furnish a more definite statement as to the valuable considerations mutually received stated in the first sentence of said amendment, and assigns the following grounds:

1. The defendant is not in a position to controvert any fact in reference to the valuable considerations mutually received referred to in said first sentence of the said amendment.

2. That plaintiff be required to state exactly what was the valuable consideration which Susan J. Graham received from plaintiff.

3. That the plaintiff be required to state exactly what was the valuable consideration passing from Susan J. Graham to Susan Graham Reeves referred to in the amendment to Count Two.

4. Defendant is unable to determine whether or not plaintiff relies on the considerations stated in the alleged contract or whether or not there were other considerations passing as a basis for the contract.

This motion is made by defendant because the considerations referred to are not averred with sufficient definiteness or particularity to enable him properly to prepare his responsive pleading or to prepare for trial.

C. P. DICKINSON,
Attorney for Defendant
William Beardall.

Mezzanine-Annex to O. B. & T. Building.
Orlando, Florida.

THIRD MOTION.

MOTION TO DISMISS COUNT TWO OF THE COMPLAINT AS AMENDED BY AMENDMENT FILED HEREIN.

48

Filed Jan. 21, 1941, Orlando, Fla.

(Title Omitted.)

Defendant William Beardall, as Executor of the last will and testament of Susan J. Graham, deceased, moves the Court to dismiss the complaint as amended as to Count Two and assigns the following grounds:

1. There was no consideration for the agreement numbered Exhibit D, and made a part of Count II.
2. There was no mutuality in the contract referred to as Exhibit D.

3. There is no showing that Susan G. Reeves is entitled alone to attack the execution by Susan J. Graham of her last will and testament dated the 16th of June, 1939.

4. Count No. II does not show any valid subsisting agreement entered into by and between plaintiff and Susan J. Graham so as to prevent her, the said Susan J. Graham, from executing a will at any time and revoking any and all former wills, including the will dated the 1st of May, 1931.

5. It appears on the face of the pleadings in Count No. II that there are other parties interested in the will of Susan J. Graham of May 1, 1931, and they are not parties to this proceeding.

6. The alleged contract attached as Exhibit D is too uncertain and indefinite for specific performance.

7. The alleged contract attached and made a part of this count is so uncertain and indefinite that the Court could not frame an appropriate decree thereon for purposes for which same is sought to be used.

8. Plaintiff is not entitled to recover damages against the estate of Susan J. Graham for executing the will of June, 1939, and plaintiff has not shown nor alleged any state of facts authorizing the recovery of damages by plaintiff against the estate of Susan J. Graham.

9. Said Count Two fails to state a claim upon which relief can be granted against this defendant.

10. That part of Count Two contained in the amendment merely states the construction of the contract placed

thereon by the plaintiff and seeks to lay a foundation for introduction to parol testimony, to vary the terms of the contract in writing.

11. Nothing can be added to or taken from the contract on which the action is based and the contract will govern and control alone the rights of the parties.

12. Count Two is inconsistent and repugnant in that it alleges by the amendment that same was entered into for valuable considerations mutually received by the plaintiff and Susan J. Graham, whereas the contract shows no consideration.

C. P. DICKINSON,
Attorney for Defendant
William Beardall.

Mezzanine-Annex to O. B. & T. Building,
Orlando, Florida.

50

ORDER OF COURT.

Filed Feb. 26, 1941, Orlando, Fla.

Orl. C. O. B. 1-462.

(Title Omitted.)

After notice to counsel and argument before the Court by counsel for the respective parties of the motion of defendant William Beardall as executor of the estate of Susan J. Graham, deceased, to strike plaintiff's amendment to Count II of the complaint,

It is Ordered that defendant's motion be, and the same is hereby granted and plaintiff's amendment to Count II

of the original complaint wherein paragraph six was omitted on page 2 and the part in the amendment was substituted in place thereof, be, and the same is hereby stricken.

Plaintiff advised the Court at the hearing by counsel that she did not desire to amend.

Done and Ordered at Orlando, Florida, February 25, 1941.

ALEXANDER AKERMAN, -
District Judge.

51

ORDER OF COURT:

Filed Feb. 26, 1941, Orlando, Fla.

Orl. C. O. B. 1-463.

(Title Omitted.)

The Court having heretofore, after notice and on hearing of counsel for the respective parties present, stricken plaintiff's amendment to Count Two of the complaint, and plaintiff by counsel announcing that she did not desire to amend further, and at the same hearing the cause came on before the Court on motion of defendant William Beardall, as executor, to dismiss the complaint as to Count Two, and as aforesaid the amendment to Count Two as to William Beardall, as executor, having been stricken,

It is Ordered that plaintiff's complaint as to Count Two be, and the same is hereby dismissed.

And plaintiff having announced by counsel that she did not desire to amend,

It is Ordered, that final judgment be entered on Count Two of plaintiff's complaint in favor of defendant, William Beardall, as executor of the estate of Susan J. Graham.

Done and Ordered January 25, 1941.

ALEXANDER AKERMAN,
District Judge.

52

FINAL JUDGMENT.

Filed Feb. 26, 1941, Orlando, Fla.

Orl. C. O. B. 1-465.

In the District Court of the United States, for the Southern District of Florida.

Civil Action File No. 72 Orl.

Susan G. Reeves, Plaintiff,

vs.

William Beardall, as Executor of the Last Will and Testament of Susan J. Graham, Deceased, and William M. Hamer, Defendants.

The Court heretofore having sustained motion of defendant William Beardall, as executor of the estate of Susan J. Graham, deceased, to dismiss plaintiff's complaint as to Count Two, and plaintiff having announced by counsel that she did not desire further to amend,

It is Ordered and Adjudged that this suit as set out in Count Two of plaintiff's complaint be, and the same is hereby dismissed as to William Beardall as executor of the estate of Susan J. Graham, deceased, and that the plaintiff Susan G. Reeves take nothing by her plaint, and that the defendant William Beardall, as executor of the estate of Susan J. Graham, deceased, as to plaintiff's claim set up in Count Two of her complaint, go hence without day.

Done and Ordered this, the 26th day of February, 1941.

ALEXANDER AKERMAN,

District Judge.

NOTICE OF APPEAL TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

53 Filed Mar. 26, 1941, Orlando, Fla.

In the District Court of the United States of America,
for the Southern District of Florida.

Susan G. Reeves, Plaintiff-Appellant,

against

72 Orl. Civil.

William Beardall, as Executor of the Last Will and Testament of Susan J. Graham, Deceased, Defendant-Appellee.

Notice is hereby given that Susan G. Reeves, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Fifth Circuit from the Order granting defendant Beardall's Motion to Strike Plaintiff's Amendment to Count II dated February 25th, 1941, and filed February 26th, 1941; from the Order dismissing Plaintiff's

complaint as to Count II and for entry of Final Judgment on Count II in favor of defendant Beardall dated February 25th, 1941, filed February 26th, 1941, and from the Final Judgment on Count II in favor of defendant Beardall, dated February 26, 1941, and filed in this action on February 26th, 1941.

Dated at Orlando, Florida, this 26 day of March, A. D. 1941.

WILLIAM N. ELLIS,
(William N. Ellis)

37 East Pine Street,
Orlando, Florida.

JAMES BURKE,
Of the Firm of Burke &
Burke,
For the Appellant.

72 Wall Street,
New York City, New York.

DESIGNATION OF CONTENTS OF RECORD ON
APPEAL.

54 Filed Mar. 26, 1941, Orlando, Fla.

(Title Omitted.)

Comes now the Appellant and designates the following to be contained in the record on appeal:

1. Bill of Complaint filed July 12, 1940,
2. Summons and Return dated July 12, 1940, filed July 15, 1940.

3. Motion to dismiss as to Count II filed by the defendant Beardall on August 3, 1940,

4. Order on Motion to Dismiss as to William Beardall, as Executor, etc., filed December 5, 1940,

5. Motion for Rehearing filed December 14, 1940,

6. Amendment to Complaint filed January 13, 1941,

7. Defendant Beardall's Motion to Strike Amendment to Count II filed January 21, 1941,

8. Defendant Beardall's Motion for more definite statement filed January 21, 1941,

9. Defendant Beardall's Motion to Dismiss Count II of Complaint as amended, filed January 21, 1941,

10. Order granting Motion to Strike Plaintiff's Amendment to Count II, dated February 25, 1941, filed January 26, 1941,

11. Order Dismissing Plaintiff's Complaint as to Count II and for entry of Final Judgment on Count II in favor of defendant Beardall, dated February 25, 1941, and filed February 26, 1941,

12. Final Judgment on Count II in favor of defendant Beardall dated February 26, 1941, and filed February 26, 1941,

13. Notice of Appeal filed the 26 day of March, 1941,

14. This Designation of portion of the record to be included in the record on appeal.

WILLIAM N. ELLIS,
(William N. Ellis)

37 East Pine Street,
Orlando, Florida.

JAMES BURKE,
Of the Firm of Burke &
Burke,
For the Appellant.

72 Wall Street,
New York City, New York.

We hereby acknowledge receipt of a true copy of the foregoing Designation of Contents of Record on Appeal, this 26 day of March, A. D. 1941.

C. P. DICKINSON,
Of the Firm of Dickinson &
Dickinson,
For the Appellee.

Orlando, Florida.

STATEMENT OF POINTS ON WHICH APPELLANT RELIES.

56 Filed Apr. 5, 1941, Orlando, Fla.

(Title Omitted.)

On the appeal of the foregoing cause the appellant, Susan G. Reeves, relies upon the following points:

1. Count II of the complaint as amended states a good cause of action.

(a) The amendments are allegations of ultimate fact, do not vary the terms of the written agreement in question, and are proper allegations for the complaint.

2. Count II of the complaint states a good cause of action even though the amendments be stricken.

(a) A contract not to change a will is valid and enforceable and appellant may alone enforce the contract in question.

(b) The promise of the appellant in the agreement in question is consideration to support the counter-promise of Mrs. Graham so as to constitute the agreement a valid contract between appellant and Mrs. Graham.

(c) There are no other interested parties in the will of Susan J. Graham of May 1, 1931, who are necessary or proper parties to this proceeding.

(d) The contract of June 25, 1938, is not too uncertain for specific performance.

(e) There is mutuality.

WILLIAM N. ELLIS,
(William N. Ellis)

37 East Pine Street,
Orlando, Florida.

JAMES BURKE,
Of the Firm of Burke &
Burke,
For the Appellant.

72 Wall Street,
New York City, N. Y.

We hereby acknowledge receipt of a true copy of the foregoing State of Points on Which Appellant Relies, this 5th day of April, 1941.

C. P. DICKINSON,
Of the Firm of Dickinson &
Dickinson,
For the Appellee.

Orlando, Florida.

AMENDED DESIGNATION OF CONTENTS OF
RECORD ON APPEAL.

58 Filed Apr. 5, 1941, Orlando, Fla.

(Title Omitted.)

Comes now the Appellant and amends her Designation of Contents of Record on Appeal by requesting the Clerk to include, in said record the Statement of Points on Which the Appellant Relies, filed on the 5th day of April, 1941.

WILLIAM N. ELLIS,
(William N. Ellis)

37 East Pine Street,
Orlando, Florida.

JAMES BURKE,
Of the Firm of Burke &
Burke,
For the Appellant.

72 Wall Street,
New York, N. Y.

We hereby acknowledge receipt of a true copy of the foregoing Amended Designation of Contents of Record on Appeal, this 5th day of April, 1941.

C. P. DICKINSON,
Of the Firm of Dickinson &
Dickinson,
For the Appellee.

Orlando, Florida.

59

CERTIFICATE OF CLERK.

United States of America,
Southern District of Florida.

I, EDWIN R. WILLIAMS, Clerk of the United States District Court in and for the Southern District of Florida, do hereby certify that the above and foregoing typewritten pages, numbered 1 to 58, inclusive, are true and correct copies of the proceedings had in the case of Susan G. Reeves, Plaintiff, vs. William Beardell, as Executor of the Last Will and Testament of Susan J. Graham, Deceased, No. 72-Orlando Civil, prepared in accordance with the directions of the attorneys herein, as the same appear in the files and records of this Court.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of this Court, this the 9th day of April, A. D. 1941.

(Seal)

EDWIN R. WILLIAMS,

Clerk,

By WALTER A. DALEY,

Deputy Clerk.

[fol. 55] IN UNITED STATES CIRCUIT COURT OF APPEALS,
FIFTH CIRCUIT

No. 9900

SUSAN G. REEVES

versus

WILLIAM BEARDALL, as Executor of the Last will and Testament of Susan J. Graham, Deceased

ORDER DISMISSING CAUSE—October 7, 1941

This cause was this day called in its regular order;

Whereupon, it appearing to the Court that the appeal sued out in said cause was taken from a judgment (that is not final)

It Is Ordered by this Court that said cause be, and it is hereby, Dismissed.

[fol. 56] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE FIFTH CIRCUIT

No. 9900

[Title omitted]

PETITION FOR REHEARING—Filed October 22, 1941

This cause is an appeal from an order and judgment of the District Court of the United States for the Southern District of Florida striking the amendment to Count II of the plaintiff's complaint and dismissing Count II of the complaint. The case was called in its regular order for argument before this Court on the 7th day of October, 1941. Since answers have been filed to Counts I and III of the complaint and these counts are awaiting trial, this Court took the position that the judgment dismissing Count II was not final and it was ordered that this cause be dismissed.

[fol. 57] In support of the dismissal of the appeal Judge Foster referred to this Court's recent decision in *Huntman v. New Orleans Public Service*, 119 F. (2d) 465, which involved a judgment dismissing a complaint as to one of

three defendants alleged to be *jointly liable on one cause of action*. Judge Foster also asked counsel if he could cite the decision of any Circuit Court of Appeals holding that the judgment appealed from in this case would be a final judgment from which an appeal to this Court would lie.

Because of the provisions of Rules 18 and 54 (b) (and related Rules 14-20) of the new Rules of Civil Procedure, counsel had not anticipated that any question would arise as to the finality of the judgment appealed from and was therefore unfortunately unable, at the moment, to refer to any decision in support of appellant's position. Now, however, after an opportunity for research we respectfully submit that the Circuit Court of Appeals for the Second Circuit in *Collins v. Metro-Goldwyn Pictures Corp.*, 106 F. (2d) 83 (1939), has held that a judgment dismissing *one of two separate and distinct causes of action between the same plaintiff and defendant* is a final judgment from which an appeal will lie. The doctrine of this case, derived from earlier Supreme Court decisions as affected by the new Rules, would appear also to have been accepted by the Circuit Courts of Appeals for the Fourth and Seventh Circuits. (See brief annexed for a discussion of these cases and their application to this appeal.) We have found no decision to the contrary by the Supreme Court or a Circuit Court of Appeals.

Since Circuit Courts of Appeals have taken the position that a judgment dismissing a separate cause of action is a final judgment (a situation not before this Court in the *Huntman* case, *supra*), it is respectfully submitted that the judgment herein appealed from is a final judgment from which an appeal will lie and it is respectfully re-[fol. 58] quested that a rehearing be ordered and the appellant permitted to argue the appeal herein upon the merits.

Respectfully submitted, William N. Ellis, 37 Pine Street, Orlando, Florida; Burke & Burke, James B. Burke, 72 Wall Street, New York, New York,
Attorneys for Appellant.

We, William N. Ellis and James B. Burke, the attorneys for the appellant herein, certify that the foregoing petition for rehearing is made in good faith and not for the purposes of delay.

Dated October 18, 1941.

William N. Ellis, James B. Burke, Attorneys for Appellant.

[fol. 59] I, C. P. Dickinson, attorney for the appellee, believing for the reasons stated in the Petition for Rehearing that the appeal taken herein by the appellant was from a final judgment, hereby join in the foregoing Petition for Rehearing and request that appellant's appeal be heard upon the merits.

Dated October 20, 1941.

C. P. Dickinson, Attorney for Appellee.

[fol. 60] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER DENYING REHEARING—December 15, 1941

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

[fol. 61] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 62] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed February 9, 1942

The petition herein of a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.